Filed 8/2/10 Krause v. Western Heritage Ins. Co. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL KRAUSE, SR., et al., Plaintiffs and Appellants, v. WESTERN HERITAGE INSURANCE COMPANY, Defendant and Respondent.	G041405 (Super. Ct. No. 07CC00537) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Winet, Patrick & Weaver, Randall L. Winet, Catherine A. Gayer, and Marilyn Perrin for Plaintiffs and Appellants.

Selman Breitman, Alan B. Yuter, and Rachel E. Hobbs for Defendant and Respondent.

* * *

A security guard shot and killed a man at an apartment complex. Defendant Western Heritage Insurance Company (Western Heritage) refused to defend the ensuing lawsuit, citing an "assault or battery" exclusion in the liability policy at issue. Plaintiffs in this case (the victim's estate and his parents) previously obtained a default judgment of more than $6 million in their favor against Southwest District Patrol Security Company, (Southwest District Patrol) which employed the guard, as well as an assignment of rights against Western Heritage. The trial court granted Western Heritage's motion for directed verdict, finding "there's simply no reasonable reading of the facts that were available to the carrier at the time it made its decision that would allow for coverage under the policy, [or] even [to trigger] . . . the duty to defend . . . ." We affirm.

FACTS

Background

Southwest District Patrol was a private security guard company owned and operated by Robert and Jennifer Zablockis. As of May 2003, Southwest District Patrol employed three individuals other than Robert and Jennifer. Robert was the only armed guard working for Southwest District Patrol in May 2003.

The Private Security Services Act (Bus. & Prof. Code, §§ 7580 et seq.) sets forth several pertinent requirements. "No private patrol operator who employs a security guard who carries a firearm as part of his or her duties shall engage in any of the practices for which he or she is required to be licensed by this chapter, unless he or she maintains an insurance policy as defined in Section 7583.40." (Bus. & Prof. Code, § 7583.39.) "'Insurance policy,' as used in this article, means a contract of liability insurance issued by an insurance company authorized to transact business in this state which provides minimum limits of insurance of five hundred thousand dollars ($500,000) for any one

loss due to bodily injury or death and five hundred thousand dollars ($500,000) for any one loss due to injury or destruction of property." (Bus. & Prof. Code, § 7583.40.)

Robert understood the law required him to obtain liability insurance. Southwest District Patrol obtained a commercial general liability policy from Western Heritage effective May 9, 2003, through May 9, 2004. The policy had a $1 million occurrence limit. Western Heritage charged $9,213.19 for this coverage. Robert paid an extra premium for armed guard insurance (rather than unarmed guard insurance) because he believed he would be covered in case of a shooting. Western Heritage charges a higher premium for armed guards than unarmed guards. Robert believed the policy with Western Heritage complied with the Business and Professions Code requirements set forth above.

Relevant Terms of the Policy

Section I, "COVERAGES," sets forth the general liability coverage purchased by Southwest District Patrol. Part 1 of Section I, "Insuring Agreement," states in relevant part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' . . . to which this insurance does not apply. We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." "This insurance applies to 'bodily injury' . . . only if: [¶] (1) The 'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory'; [¶] (2) The 'bodily injury' . . . occurs during the policy period; and [¶] (3) Prior to the policy period, no insured . . . knew that the 'bodily injury' . . . had occurred, in whole or in part. . . . "

Part 2 of Section I, "Exclusions," states in relevant part: "This insurance does not apply to: [¶] a. Expected Or Intended Injury [¶] 'Bodily injury' . . . expected

or intended from the standpoint of the insured. This exclusion does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property."

Section V, "DEFINITIONS," defines the relevant terms used above in describing the purchased coverage. "'Bodily injury' means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." "'Suit' means a civil proceeding in which damages because of 'bodily injury' . . . to which this insurance applies are alleged." "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The final page of the insurance policy, which follows five other endorsements to the policy, is an endorsement entitled "ASSAULT OR BATTERY EXCLUSION." It states: "This policy does not apply to 'bodily injury' . . . arising out of assault or battery or out of any act or omission in connection with the prevention or suppression of such acts, including failure to warn, train or supervise, whether caused by or at the instigation or direction of the insured, his employees, patrons or any other person." There is no definition of "assault" or "battery" anywhere in the policy. There is no explanation in the policy how this exclusion relates to the intentional acts exclusion.

The insurance broker who procured this policy for Southwest District Patrol indicated she discussed the assault and battery exclusion with Robert Zablockis and Robert understood the policy had such exclusion. The insurance broker asked the "underwriter broker" (a broker selling the insurer's policies) whether this exclusion could be removed from the policy. The underwriter broker responded this provision could not be removed; the policy (which had been in place for two years prior to May 2003) could only continue as written. The assault and battery exclusion was a "mandatory endorsement for this class of business"; Western Heritage (at least at that time) would not sell a liability policy to a security firm without this endorsement. Ultimately, Southwest District Patrol accepted the policy as quoted. Beyond the language of the policy, the

record does not disclose any pre-incident understanding between the parties as to how the assault and battery exclusion would operate in any particular factual scenario.

The Incident

Sycamore Springs Apartment Complex (Sycamore Springs), reacting to parking and burglary issues, hired Southwest District Patrol to provide security services. The contract granted Southwest District Patrol permission to tow unauthorized vehicles, possess firearms while conducting patrols, and cause the detention and/or arrest of trespassers.

Southwest District Patrol hired Dameon Wroe as a security guard sometime after the insurance policy went into effect in May 2003.[1] Southwest District Patrol assigned Wroe to Sycamore Springs. His duties included patrolling the parking areas, common areas, and residence buildings. He checked vehicles inside the gated area for parking permits.

On the night of January 1, 2004, Wroe discharged his weapon while patrolling Sycamore Springs, resulting in the death of 19-year-old Michael P. Krause. Two reports (one by Robert Zablockis and one by Wroe) were prepared following the incident for submission to the California Bureau of Security and Investigative Services.

Robert based his report on his questioning of Wroe after arriving at the scene shortly after the shooting. "[Wroe] stated that he saw two men in a green pick-up truck acting suspicious at the east entrance gate, he then notice[d] a white male come from behind the vehicle . . . either pulling open the security gate, and maybe using a code to open the gate. The subjects entered the property via the east gate. (WROE) then went

---

[1] Western Heritage, in its respondents' brief, makes much of the fact that Wroe was not listed as an armed guard in the May 2003 application. But this was not the basis for the court's order granting Western Heritage a directed verdict and there is nothing in the record or briefs suggesting this issue could have been determinative as a matter of law. Thus, we will not consider this feature of the case in our review.

to investigate, and approached the men who were now stopped inside the property. (WROE) asked the driver if he or his friend lived on the property, he stated 'somewhere over there', (WROE) said 'you do not know you[r] apartment number'? The driver then said 'I don't live here, my girlfriend does' (WROE) then asked again, 'which is it you or your girlfriend live here'? That is when the driver of the truck began yelling at (WROE) 'You know what . . . Fuck You Dude, I don't have to answer anymore of your fucking questions, anymore'. That is when the driver of the pick-up truck, put the truck into reverse, and accelerated backwards striking (WROE) with the driver side mirror and side of the truck pinning (WROE) up against a parked vehicle. The driver then put the truck in drive and headed for the eastside gate, (WROE) who patrols the complex on foot and by his car, jumped into his vehicle and followed the truck to obtain a license number. That is when (WROE) saw the truck was stopped at the east gate, (WROE) then walked up to the driver side near the left fender of the pick-up truck and ordered the driver out of his vehicle to detain him at gunpoint, the gate was then opening and that is when the driver of the pick-up accelerated the pick-up and turned his wheels towards (WROE) and struck him a second time. (WROE) then discharged his duty weapon three times being in fear of his life, and to stop the threat, (WROE) further said he fired towards the driver to stop the assault on him, and then was recovering from being struck by the truck."

"(WROE) then saw the pick-up truck drive onto Archibald [Street], and then into the ACE Hardware Store parking lot across the street from the apartment complex, where the pick-up came to rest. (WROE) then went to the pick-up truck to check and/or detain the suspect, and that is when he saw that the suspect was slumped over towards the passenger side, that is when he knew he had shot the suspect, (WROE) then checked for a pulse of the suspect who was later identified as (Michael P. Krause 19, of Rancho Cucamonga). (WROE) then called 911 at 10:32 p.m. to report[] the incident to the San Bernardino County Sheriff's Department, and advised them that the suspect was down, and to send an ambulance. (WROE) then contacted the dispatch center for

Southwest District Patrol, Inc., to report the incident, and requested Robert Zablockis respond to his location. [¶] . . . (WROE) who was injured from being hit by the pick-up truck was transported by ambulance to San Antonio Hospital, and treated for his injuries. [¶] Robert Zablockis was told by the emergency room doctor that Wroe had sustained injuries to his arm, back, and legs."

Wroe's handwritten report, signed by him and dated January 3, 2004, echoed the details provided in Robert's report. Wroe's report purported to provide a verbatim transcript of his initial questioning of Krause; the transcribed conversation suggests Krause lied to Wroe about living at the apartment and how he gained access to the complex.

Wroe then wrote: "At this point, the driver started up the truck very quickly, put the truck in reverse and began to flee the location. As the driver pulled out of the stall, as I was still trying to talk to him, the side mirror of the truck struck me in the left arm (upper arm) and the driver sped away towards the south exit gate. With the intention of taking the driver into custody for assault with a deadly weapon, I immediately got into my vehicle to pursue the driver before he got to the gate. I attempted to call for back up using my company radio but my battery was completely dead. As I pulled a short distance behind the truck, I immediately exited my car and ordered the driver (at gunpoint) to shut off the truck and exit his vehicle. Acting within the scope of my training and experience, I continued shouting and yelling at the suspect to shut the truck off so that my commands could be heard by any witnesses in the area. The suspect did not comply. I took a position along-side the front quarter panel of the truck while still engaging the driver at gunpoint. As I asked the driver a final time to shut the truck off and get out he said 'why?' At that moment, I observed the driver turn the steering wheel slightly to the left and accelerate in my direction, striking my left arm and causing me to begin falling backward off balance. In fear of my life, I fired a single shot into the driver's side window. As I broke my fall by sticking out my left arm, I returned

to my feet and heard the truck still accelerating in my direction. Still in fear of my life, I fired two additional rapid-fire rounds at the driver to disable the vehicle to get it to stop. I then fired a final, single shot at the rear of the truck as the truck began to pull away, but was unable to tell if my final round actually hit the vehicle. I immediately returned to my vehicle again to follow the truck pending the arrival of the local authorities."

Wroe called 911 and requested paramedics. According to the coroner, Michael Krause died as a result of a gunshot wound to the chest. Wroe was charged with murder. A jury found Wroe not guilty of murder, but was deadlocked as to the lesser included offense of voluntary manslaughter (Pen. Code, § 192, subd. (a).) Wroe ultimately pleaded nolo contendere to involuntary manslaughter in March 2005.

Denial of the Claim and Duty to Defend

Robert promptly notified his insurance broker, who submitted a claim to Western Heritage on January 9, 2004. Western Heritage received a copy of the "Report of Incident" submitted by Robert to the California Bureau of Security and Investigative Services, which included the reports prepared by Robert and Wroe. A "claim note" written by claims examiner Keith Shanks on January 13 stated as follows: "REC'D NEW LOSS INVOLVING AN ALTERCATION BETWEEN ONE OF THE INSURED'S SECURITY GUARDS AND THE DECEASED CLT. CLAIM NOT YET IN SUIT AS THE INCIDENT ONLY OCCURRED NEW YEAR'S MORNING, LESS THAN TWO WEEKS AGO. IN ANY CASE THE INSURED'S GUARD FELT IN FEAR OF HIS LIFE, AND SHOT SEVERAL ROUNDS AT THE DECEASED'S TRUCK AFTER I[T] WAS DRIVING AWAY FROM HAVING STRUCK THE GUARD. THE TRUCK ENDED UP IN A GROCERY PARKING LOT ACROSS THE STREET WHERE THE DRIVER WAS FOUND SLUMPED OVER THE STEERING WHEEL AND ALREADY DEAD. WE HAVE THE A & B EXCLUSION ON THE POLICY. I WILL DICTATE A DISCLAIMED LETTER ACCORDINGLY."

Shanks responded to the claim by letter on January 14, 2004. He first described the incident: "A detailed description of the events leading up to the shooting indicates that Dameon Wroe had a confrontation with Mr. Krause, who was operating a pickup truck, which in fact, twice struck Mr. Wroe. When Mr. Krause attempted to flee the scene in his pickup truck, Dameon Wroe fired several shots toward the driver, Mr. Krause, whose vehicle came to rest in a parking lot across the street from the apartment complex where Mr. Krause was found fatally injured by the gunshot wound." Shanks then quoted relevant portions of the insurance contract.

Shanks rejected the claim: "Notwithstanding the fact that your Application for liability insurance indicates that you are the only armed employee, which is contrary to the facts of this case involving Messrs. Wroe and Krause, the fact of the matter is that the exclusion recited above precludes coverage for this claim altogether. Mr. Krause was fatally wounded from a gunshot wound as a result of action taken by Mr. Wroe. Your policy provides no coverage whatsoever for assault or battery. As such, we regret to advise you that we will be unable to consider this claim as one for defense or indemnification." Nonetheless, Shanks requested any lawsuit papers or any additional information to be forwarded to Western Heritage for its review.

Procedural History of Wrongful Death Action

Plaintiffs sued Wroe, Southwest District Patrol, Sycamore Springs, and Southern California Housing Development Corporation in a wrongful death action in October 2004. The complaint included four causes of action: (1) wrongful death based on negligence of all defendants; (2) wrongful death based on negligent hiring by the corporate defendants; (3) wrongful death based on assault and battery by all defendants; and (4) wrongful death based upon violation of the Unruh Civil Rights Act against all defendants.

The negligence cause of action alleged the following facts: "On or about January 1, 2004, Michael Krause, Jr., drove to the Sycamore Springs Apartments with a friend. The purpose of driving to the apartments was to meet with a girl that Michael Krause, Jr., had recently met. Michael Krause, Jr., was driving a 1998 Chevy Pick-up . . . . [¶] On that same date, Dameon Wroe and DOES 1 through 5 were working as security guards for Defendant Southwest District Patrol Security Company . . . . On information and belief, the Defendants, and each of them, and doing the things herein alleged, were acting within the course and scope of such service, agency, employment and joint venture and with the knowledge, permission and authority of other Defendants, and each of them, and is liable in some manner for the damages to the Plaintiffs as set forth in the Complaint. [¶] . . . Defendants had advance notice and had been specifically told that Dameon Wroe, DOES 1 through 5, and other security officers had negligently and carelessly pulled their firearms, threatened other individuals, and were a danger and concern to residents and their guests at Sycamore Springs Apartments."

"On or about January 1, 2004, Dameon Wroe and DOES 1 through 5 confronted decedent Michael Krause, Jr., pulled his firearm, and shot at Michael Krause, Jr., causing damage to the truck and resulting in the death of Michael Krause, Jr. The actions of [Wroe and the other named defendants] were caused by Defendants' negligence and carelessness, resulting in the damages referenced below. [¶] [The corporate defendants] were responsible for maintaining safe, efficient and proper security for the Sycamore Springs Apartments. In allowing Dameon Wroe [and other guards] to carry firearms, knowing that there had been complaints about them in the past in a residential community involving numerous persons, [the corporate defendants] negligently managed, maintained, owned, and operated said premises. [¶] As a result of the conduct of Defendants, and each of them, Michael Krause, Jr., died. The actions of Defendants have resulted in funeral and burial expenses, the loss of love, care, comfort

and society of Plaintiffs, property damage to the subject truck and other damages and costs of suit as alleged herein."

After receiving this complaint, Shanks reiterated Western Heritage's position in a December 2, 2004 letter: "Once again, we must advise you that Western Heritage . . . finds no coverage for this lawsuit by virtue of the fact that the Assault or Battery Exclusion precludes coverage altogether. Accordingly, we will be unable to provide you with a defense or indemnification under the circumstances." An attorney for Southwest District Patrol contested this denial by letter, pointing out that the complaint contained negligence causes of action. She added that her client lacked sufficient funds to defend the lawsuit and demanded Western Heritage defend the claim without regard to any reservation of right to ultimately deny the claim. Southwest District Patrol incurred $4,551 in attorney fees trying to convince Western Heritage to provide a defense. Counsel for Western Heritage responded to this letter, reaffirming the contention that the assault and battery exclusion precluded any coverage under the facts of the case. Western Heritage did not provide a defense at any time or reimburse Southwest District Patrol for its costs of defense.

Wroe separately settled with plaintiffs: Wroe agreed to pay $125 per month for seven years (a total of $10,500). On December 6, 2006, the trial court entered default judgment against Southwest District Patrol in the amount of $6,018,912.46. In February 2007, plaintiffs covenanted not to execute on their judgment in exchange for an assignment of Southwest District Patrol's rights against Western Heritage pertaining to the incident at issue.[2]

---

[2] Western Heritage attempts to argue this assignment was invalid because Southwest District Patrol was allegedly a suspended corporation at the time of the assignment. We will not address this argument as it is not properly before us. The trial court did not rely on this ground in granting the motion for directed verdict and Western Heritage did not file a cross-appeal.

Procedural History of Action Against Western Heritage

Thereafter, plaintiffs sued Western Heritage (as well as two insurance brokers) for breach of contract, breach of the covenant of good faith and fair dealing, and negligent misrepresentation.

The court denied Western Heritage's motion for summary judgment. The tentative ruling (which appears to be the basis for the court's denial) states in relevant part: "There are triable issues of fact as to whether coverage can be denied under the assault and battery exclusion. The statement of Mr. Wroe is not conclusive on whether or not he acted intentionally, if Mr. Krause did so, or if either or both of them acted negligently (e.g. the shooting was negligent; Mr. Wroe intended no harm to the decedent). . . . Thus, there is a possibility of insurance coverage for the incident."

The court, however, granted Western Heritage's motion for directed verdict and entered judgment for Western Heritage. "The motion for directed verdict is granted. I find that there's simply no reasonable reading of the facts that were available to the carrier at the time it made its decision that would allow for coverage under the policy, even the . . . duty to defend, which . . . as the law says is certainly broader than a duty to indemnify. [¶] And I find that the assault and battery . . . exclusion does apply. There is no ambiguity between that and the [expected or intended injury exclusion]."

DISCUSSION

A directed verdict is appropriate only if the evidence is insufficient to support a contrary judgment. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521.) In reviewing the judgment, we "'view the evidence in the light *most favorable to* [plaintiffs].'" (*Ibid*.)

The issue presented[3] is whether the facts available to Western Heritage when it denied a defense to Southwest District Patrol gave "rise to the potential of liability under the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 276-277 (*Gray*).) "[T]he insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." (*Id*. at pp. 275-276, fn. 15.) "[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify. [Citations.] Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 299-300.) "The duty to defend is determined by reference to the policy, the complaint, and *all* facts known to the insurer from any source." (*Id*. at p. 300.) An "insurer that wrongfully refuses to defend is liable on the judgment against the insured." (*Gray, supra*, 65 Cal.2d at p. 279.)

"Coverage may be limited by a valid endorsement and, if a conflict exists between the main body of the policy and an endorsement, the endorsement prevails. [Citation.] But to be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' [Citation.] Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words

---

[3] In its brief, Western Heritage raises for the first time the possibility that the incident at issue was not even an "occurrence" under the policy. (See *Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 317 ["We conclude here that an insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into 'an accident' within the policy's coverage clause. Therefore, the insurance company had no duty to defend its insured in the lawsuit brought against him by the injured party"].) We will not assess the merits of this issue, as Western Heritage did not deny the claim on this ground and did not raise this issue in the trial court.

that are part of the working vocabulary of the average layperson." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) Our task is confined to asking "whether the particular phrase is ambiguous in 'the context of *this* policy and the circumstances of *this* case.'" (*Jordan v. Allstate Ins. Co.* (2004) 116 Cal.App.4th 1206, 1214.)

Western Heritage asserts there was no duty to defend. "[I]f Wroe was not the assailant and was reasonably acting to defend himself, then there was still an assault and battery on the part of Krause, Jr." Counsel for Western Heritage, answering his own question in his argument in favor of the directed verdict motion, stated: "Is there some way that Mr. Wroe can be held liable for mere negligence, as opposed to assault or battery? [¶] There is no way. If he was justified, he wins the case. The only way he can lose the case is if he used excessive force or he out and out committed a battery when he pointed the gun; it was out and out assault."

Plaintiffs contend there was a duty to defend because the facts left open the possibility of a negligent exercise of self-defense not amounting to an assault or battery: "Reviewing Mr. Wroe's description of the events leading up to the shooting, Mr. Wroe may have negligently misinterpreted the actions of Mr. Krause, and acted negligently, not intentionally. . . . [¶] . . . [¶] It does not require a strained reading of the facts to recognize the *potential* that both Mr. Wroe and Mr. Krause were negligent in their conduct."

Parties' Respective Positions

Both sides rightly point to the text of the policy in pressing their positions. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 ["The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it"].)

Western Heritage cites the assault and battery exclusion as the beginning and end of the inquiry: "This policy does not apply to 'bodily injury' . . . arising out of

assault or battery or out of any act or omission in connection with the prevention or suppression of such acts, including failure to warn, train or supervise, whether caused by or at the instigation or direction of the insured, his employees, patrons, or any other person." As Western Heritage notes, the assault and battery exclusion is remarkably broad. It purports to exclude any bodily injury arising out of assault or battery, or the suppression of assault or battery, regardless of whether the assault or battery was caused or instigated by the insured (Southwest District Patrol), its employee (Wroe), or any other person (Krause).

Western Heritage contends that regardless of who committed the assault or battery, any bodily injury arising out of an assault or battery is not insured, irrespective of any potentially valid claims of self-defense by Wroe. And, according to Western Heritage, the only reasonable conclusion from the factual record is that an assault or battery took place, eliminating the potential for coverage. As such, any attempt by plaintiffs to force the case into a negligence framework is unsupported by the facts, notwithstanding the existence of negligence causes of action in the complaint in the underlying action.

Plaintiffs claim the policy explicitly covers "'bodily injury' resulting from the use of reasonable force to protect persons or property." Plaintiffs assert this language necessarily provides potential coverage for a security guard who uses force and claims self-defense. Otherwise, the clause pertaining to reasonable force is a useless appendage to the policy, a result not favored according to the ordinary principles of contract interpretation. Plaintiffs attempt to harmonize the intentional acts exclusion and the assault and battery exclusion by asserting the use of "reasonable force to protect persons or property" is not an "assault or battery" under either civil or criminal law. (See, e.g., Civ. Code, § 50; Pen. Code, §§ 197, 692-694; CACI No. 1304; CALCRIM No. 3470.)[4]

[4] The policy is remarkably vague as to what it means by "assault" or "battery." There are no definitions provided for these terms in the policy. Excluding

definitions pertaining to military maneuvers, one dictionary defines "assault" as either "a violent physical or verbal attack" or "a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger or in apprehension of such harm or contact." (Merriam-Webster's 11th Collegiate Dict. (2007) p. 73.) The same dictionary (again excluding military and other non-relevant denotations) defines "battery" to consist of either "the act of battering or beating" or "an offensive touching or use of force on a person without the person's consent." (Merriam-Webster's 11th Collegiate Dict., *supra*, at p. 104.)

Black's Law Dictionary defines "assault" to include: "1. *Criminal & tort law*. The threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery. 2. *Criminal law*. An attempt to commit battery, requiring the specific intent to cause physical injury. — Also termed (in senses 1 and 2) *simple assault*. 3. Loosely, a battery. 4. Popularly, any attack." (Black's Law Dict. (7th ed. 1999) p. 109.) "Battery" is defined as "1. *Criminal law*. The application of force to another, resulting in harmful or offensive contact. . . . 2. *Torts*. An intentional and offensive touching of another without lawful justification." (Black's Law Dict., *supra*, at p. 146.)

With regard to California criminal law, "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "A battery is any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.) Both crimes require the defendant to be found to have committed the crime "willfully." (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1194; *People v. Lara* (1996) 44 Cal.App.4th 102, 107; CALCRIM No. 915; CALCRIM No. 960.) "The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." (Pen. Code, § 7, subd. (1).) If the evidence allows such an inference, the lack of self-defense is an element of an alleged crime; it is the prosecution's burden to prove beyond a reasonable doubt the alleged crime was not justified. (*People v. Banks* (1976) 67 Cal.App.3d 379, 384; CALCRIM No. 3470.)

The intentional torts of assault and battery are defined differently in California civil law cases. "'Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.' [Citation.] A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm." (*Lowry v. Standard Oil Co.* (1944) 63 Cal.App.2d 1, 6–7.) "The tort of assault is complete when the anticipation of harm occurs." (*Kiseskey v. Carpenters' Trust For So. California* (1983) 144 Cal.App.3d 222, 232; see CACI No. 1301 [elements of assault].) "A battery is any intentional, unlawful and harmful contact by one person with the person of another. [Citations.] A harmful contact, intentionally done is the essence of a battery. [Citation.] A contact is

Plaintiffs claim California law actually allows for the possibility of coverage for negligent exercise of self-defense rights. Our Supreme Court raised this possibility more than 40 years ago in *Gray*, *supra*, 65 Cal.2d 263. In *Gray*, the insured had a "comprehensive" liability policy providing coverage for "'all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage,'" but excluding "'bodily injury . . . caused intentionally by or at the direction of the insured.'" (*Id*. at p. 267.) The insured was involved in an altercation with another driver: after a near-collision, the other driver "left his vehicle, approached [insured's] car in a menacing manner and jerked open the door. At that point [insured], fearing physical harm to himself and his passengers, rose from his seat and struck [the other driver]." (*Id*. at p. 267, fn. 1.) The other driver sued the insured for intentional tort; the insured, whose insurer refused to provide a defense, claimed self-defense but ultimately was found liable by a jury for $6,000 in actual damages. (*Id*. at p. 267.)

In a subsequent action by the insured against his insurer, the *Gray* court found ambiguity and uncertainty in the policy, and held the insured could reasonably expect a defense under the circumstances. (*Gray*, *supra*, 65 Cal.2d at pp. 272-273.) Of particular note, the court explained: "[D]espite [the other driver's] pleading of intentional and willful conduct, he could have amended his complaint to allege merely negligent conduct. Further, [insured] might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not

---

'unlawful' if it is unconsented to." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 611; see CACI No. 1300 [elements of battery].) Self-defense is an affirmative defense to assault or battery in a civil case. (*Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 386; CACI No. 1304.)

The precise definition of assault and battery could prove in some cases to be central to the determination of whether the assault and battery exclusion applies. We note for purposes of this case that any reasonable definition of these terms would, at a minimum, include purposefully firing a gun at another person without consent or legal justification (such as reasonable force in defense of persons and property).

commit willful and intended injury, but engaged only in nonintentional tortious conduct. Thus, even accepting the insurer's premise that it had no obligation to defend actions seeking damages not within the indemnification coverage, we find, upon proper measurement of the third party action against the insurer's liability to indemnify, it should have defended because the loss could have fallen within that liability." (*Id*. at p. 277; see also *Mullen v. Glens Falls Ins. Co.* (1977) 73 Cal.App.3d 163, 170 ["It is now settled that injuries resulting from acts committed by an insured in self-defense are not 'intended' or 'expected' within the meaning of those terms as customarily used in an exclusionary clause like the one involved in the present case"].)

According to Western Heritage, the assault and battery exclusion (which was not in the policy at issue in *Gray*) is separate and apart from, and does not conflict with, the intentional injury exclusion. Coverage is granted by the policy for certain "occurrences" resulting in bodily injury. Exclusions remove coverage already granted elsewhere in the policy; this is the purpose of exclusions in every insurance policy. The intentional acts exclusion did not grant coverage for reasonable use of force for defense of persons or property; rather, the intentional acts exclusion simply did not exclude occurrences in which force is used in defense of persons or property. The assault and battery exclusion, separate and apart from the intentional acts exclusion, excluded any bodily injury arising out of assault or battery.

The court asked counsel for Western Heritage: "So then my question is why even have it in there? What benefit does the insured have from that little provision that says if you act in self-defense yes, you can get coverage?" Counsel for Western Heritage responded: "[The intentional injury exclusion with the accompanying exception for reasonable force is] in the basic policy form so they don't take it out of the form. They just add on the assault and battery exclusion." The court then asked counsel for Western Heritage what exactly would be covered with regard to the ordinary activities of a security guard "intervening in some sort of crime that is taking place?" Counsel

responded: "Well, the policy covers a lot of different things. But in terms of a shooting . . . as long as the gun goes off accidentally, that's a very large area of coverage. [¶] . . . [¶] And it wouldn't just have to be a gun. It could be any weapon . . . . So it does give coverage." The court commented that it "seems to be minimal coverage . . . . [I]t seems to me as soon as you start intervening [in any situation], you're going to find yourself without coverage; right." Counsel responded: "Well, the carrier was only willing to issue the policy with that exclusion. They were not willing to offer the broader coverage. [¶] So that's all I can say about it. Even if it's a broad exclusion, that was the deal basically."

An experienced Western Heritage employee also testified on this point: "Well, an armed guard carries firearms. Firearms are dangerous. They go off all the time accidentally. They get dropped. They get pulled out of the holster. People twirl them on their fingers. [¶] I've had cases with firearms where people have shot them at metal targets and the sparks from a ricochet starts a forest fire. There are all kinds of things that go on with firearms. That coverage is taken care of in the policy. [¶] What's not taken care of in the policy are intentional assaults and batteries that are not accidents. It's clear. It was agreed to. Everybody understands that."

Plaintiffs counter that, because of alleged ambiguity in the policy relating to the two pertinent exclusions, Southwest District Patrol at least had a reasonable expectation of a defense in cases in which its security guards utilized force in defense of persons or property. "An insurer has a duty to defend when the policy is ambiguous and the insured would reasonably expect the insurer to defend him . . . against the suit based on the nature and kind of risk covered by the policy . . . ." (*Foster-Gardner, Inc. v. National Union Fire Ins.* Co. (1998) 18 Cal.4th 857, 869.) Plaintiffs also posit the assault and battery provision as interpreted by Western Heritage makes the insurance policy

illusory and void as against public policy (as expressed in the Business & Professions Code provisions requiring armed security guards to have liability insurance).[5]

Case Law Analyzing Assault and Battery Exclusions

There is a plethora of case law interpreting and applying assault and battery exclusions in liability insurance contracts, including two California appellate court cases affirming summary judgment in favor of insurers relying on the exclusion. (See *Zelda, Inc. v. Northland Ins. Co.* (1997) 56 Cal.App.4th 1252 (*Zelda*); *Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121 (*Century Transit*).)

In *Century Transit*, the insured employed a taxi cab driver who, while acting in the course of his employment, encountered a public political demonstration by gay activists. (*Century Transit, supra*, 42 Cal.App.4th at p. 123.) The driver "made a number of verbal and physical threats toward the demonstrators" on the first occasion he encountered the rally; two hours later, the driver "exited his cab with a . . . flashlight and used it to beat two men who were engaged in the act of videotaping the demonstration. This attack was unprovoked and continued until at least one of the men was beaten unconscious." (*Id*. at pp. 123-124.) The victims filed a complaint against the driver and the insured, alleging claims for assault and battery, as well as negligent hiring and supervision of the driver. (*Id*. at p. 124.)

The liability policy in *Century Transit* featured several differences from the policy at issue in the instant case, but the policies are sufficiently similar for the case to be helpful to our task. The *Century Transit* policy defined "occurrence" as "'an accident . . . which results in bodily injury . . . neither expected or intended from the standpoint of

---

[5] Indeed, one of plaintiffs' experts testified that the policy, as interpreted by Western Heritage, is illusory. He testified it is not common for an insurance company to append an assault and battery exclusion to a liability policy for armed guards.

the insured.'" (*Century Transit*, *supra*, 42 Cal.App.4th at p. 124.) The insured paid an additional premium for a modification of this definition: "'The definition of occurrence includes any intentional act *by or at the direction of the insured* which results in bodily injury, if such injury arises *solely from the use of reasonable force* for the purpose of protecting persons or property.'"[6] (*Ibid*.) The assault and battery exclusion stated: "'No coverage shall apply under this policy for any claim, demand or suit *based on assault and battery* and assault shall not be deemed an accident, whether or not committed by or at the direction of the insured.'" (*Ibid*.) The insurer denied coverage and refused to provide a defense on the grounds: (1) the incident did not constitute an "occurrence"; and (2) coverage was precluded by the assault and battery exclusion. (*Id*. at pp. 124-125.)

In affirming summary judgment for the insurer, the court found "no ambiguity" in the assault and battery exclusion. (*Century Transit*, *supra*, 42 Cal.App.4th at p. 126.) "[A] suit *based on assault and battery* is excluded no matter who commits it. It is the happening of that event which compels application of the exclusion." (*Ibid*.) Moreover, "such an exclusion precludes coverage of *any* claim based on assault and battery *irrespective* of the legal theory asserted against the insured." (*Id*. at p. 127.) The court rejected the contention that the special endorsement modifying the definition of "occurrence" to include "reasonable force" changed its analysis. (*Id*. at p. 129.) "[T]here has never been any claim that [the driver's] actions constituted 'reasonable force' used to protect persons or property. Indeed, [the insured] has at all times conceded that his conduct amounted to an assault and battery. [Driver's] conviction of four criminal counts of assault . . . settled the issue as a matter of law. It simply cannot be argued that the special liability endorsement has any application to this case." (*Id*. at pp. 129-130.)

---

[6] Thus, the *Century Transit* policy includes the "reasonable force" language in its definition of "occurrence" rather than as an exception to the intentional acts exclusion as in the Western Heritage policy.

The factual circumstances here differ from those in *Century Transit*. Wroe claimed self-defense. But the *Century Transit* case noted in dicta: "Even if such a self-defense argument had a factual basis, the exclusion would still apply. An act of self-defense necessarily involves resistance to an assault and battery by another. Thus, the claim against the insured would still be based upon or arise from an assault and battery." (*Century Transit*, *supra*, 42 Cal.App.4th at p. 129, fn. 8.)

In *Zelda*, the insured submitted a claim for an incident at its restaurant. (*Zelda*, *supra*, 56 Cal.App.4th at pp. 1256-1257.) A police report indicated that when a restaurant employee announced last call at 1:45 a.m., "[customer] refused to give up his drink and attempted to punch [employee], who then defended himself by punching [customer]." (*Ibid*.) Customer, through correspondence and ultimately a complaint, alleged he suffered damages as a result of the employee throwing customer to the ground and kicking him in the face. (*Id*. at p. 1257.) The complaint included claims for premises liability, negligence, and intentional tort. (*Ibid*.) The first amended complaint included claims for assault and battery; intentional infliction of emotional distress; negligent hiring, training, and supervising; and negligent infliction of emotional distress. (*Ibid*.)

The insurer refused to provide a defense on multiple occasions, citing an assault and battery exclusion in the policy. (*Zelda*, *supra*, 56 Cal.App.4th at pp. 1257-1258.) The policy provided no coverage for "'"bodily injury" or "property damage": [¶] (1) expected or intended from the standpoint of any insured. [¶] (2) arising out of assault or battery, or out of any act or omission in connection with the prevention or suppression of an assault or battery.'" (*Id*. at p. 1260.) "[Customer] eventually dismissed his intentional tort claims against [the insured], and settled his action against them . . . ." (*Id*. at p. 1258.)

The *Zelda* court affirmed summary judgment in favor of the insurer. The assault and battery exclusion, "by its plain language, covers injury or damage arising when someone (not necessarily an insured) commits an act of assault or battery, or is in

the course of committing an assault or battery." (*Zelda, supra*, 56 Cal.App.4th at p. 1261.) The documents available to the insurer "support two versions of the altercation between [customer] and [employee]. The complaints and letter portray an unwarranted assault and battery by [employee] upon [customer] in which [employee] threw [customer] to the ground and kicked him. By contrast, the police report indicates that [customer] first assaulted [employee] by throwing a punch, and [employee] responded in self-defense. [¶] Both versions of the altercation trigger the exclusion. Under each version, [customer's] injuries stemmed from an unwarranted assault." (*Id*. at p. 1262.)

The court rejected an argument, based on *Gray*, *supra*, 65 Cal.2d 263, that "there was a potential for coverage because the conduct involved in the altercation may not have risen to assault or battery." (*Zelda*, *supra*, 56 Cal.App.4th at p. 1262.) "Appellants can escape the scope of the exclusion here only by speculating that *both* [employee] and [customer] engaged in merely negligent conduct, contrary to the complaints' allegations and the statements in the police report. However, '[a]n insured may not trigger the duty to defend by speculating about extraneous "facts" regarding potential liability or ways in which the third party claimant might amend its complaint at some future date.'" (*Id*. at pp. 1262-1263.)

Given the factual differences between the instant case and the *Century Transit* and *Zelda* cases, it is worth considering non-California authorities. A sizable collection of federal and out-of-state authorities support the conclusion that, regardless of the theories pleaded in a complaint, the use of physical force amounting to assault or battery eliminates an insurer's duty to defend when a broad assault or battery exclusion is in the policy. (See, e.g., *Essex Ins. Co. v. Yi* (N.D.Cal. 1992) 795 F.Supp. 319, 321-324 [forceable removal of amusement center patron by employee; summary judgment for insurer]; *Terra Nova Ins. Co. v. Nanticoke Pines, Ltd.* (D.Del. 1990) 743 F.Supp. 293, 294, 297-298 [security guard employee shoots patron outside tavern; summary judgment for insurer]; *St. Paul Surplus Lines Ins. Co. v. 1401 Dixon's, Inc.* (E.D.Penn. 1984) 582

F.Supp. 865, 866-867 [patron of tavern violently struck by unknown assailant in parking lot of tavern; summary judgment for insurer]; *Colter v. Spanky's Doll House* (Ohio Ct.App. Ohio 2006) 2006 WL 235045 [one patron of adult club shot by another patron; summary judgment for club's insurer].)

There are, however, limits to the reach of assault and battery exclusions. (See, e.g., *American Best Food, Inc. v. Alea London, Ltd.* (Wash. 2010) 229 P.3d 693, 694 ["complaint alleging that postassault negligence caused or exacerbated injuries [does not fall] under an insurance policy's assault and battery exclusion"]; *Penn-Star Ins. Co. v. Griffey* (Mo. Ct.App. 2010) 306 S.W.3d 591 [bouncer's physical removal of customer from bar led to injuries when customer fell on the sidewalk after being released; declaratory judgment for insurer reversed because it "cannot be said that the physical removal of an unruly patron is by definition an assault and battery" because a "proprietor is permitted to use reasonable force to eject a person whose permission to be on the premises has been revoked"]; *QBE Ins. Corp. v. M&S Landis Corp.* (Super.Ct. Pa. 2007) 915 A.2d 1222, 1224-1225, 1228-1229 [reversing summary judgment for insurer; complaint only alleged negligent acts leading to death of customer when bouncers ejected him from the bar and then laid on top of him cutting off his air supply]; *Western Heritage v. Estate of Dean* (E.D.Tex. 1998) 55 F.Supp.2d 646, 647-652 [insurer's motion for summary judgment denied, because one claim of negligent failure to render aid (e.g., by calling an ambulance) following the battery of a patron by another patron led to his subsequent death after the employees decided to let the injured man "'sleep off'" his intoxication].)

In sum, broad assault or battery exclusions have been held to be unambiguous and given effect in California and other states. But we disagree with the premise that any exercise of force to protect persons or property, whether self-defense or not, necessarily involves an assault or battery under the policy. As the out-of-state authorities above suggest, there may exist factual scenarios in which the use of physical

force by an insured, which leads to bodily injury, does not entail a lack of possible coverage under an assault or battery exclusion.

The Facts of This Case: Wroe's Firing of the Gun

Here is the crux of the case: assuming Krause did not commit an assault or battery,[7] is it conceivable, in the context of determining insurance coverage, Wroe's actions could trigger indemnity? Whether a policy provides coverage is a separate question from whether a third party plaintiff can choose to plead and proceed on a negligence theory despite evidence of willful and intentional conduct. (See *American Employer's Ins. Co. v. Smith* (1980) 105 Cal.App.3d 94, 101-102.) Plaintiffs have the prerogative to sue for negligence, rather than intentional tort.[8] But the liability insurer is not obligated to ignore an assault and battery exclusion merely because a third party seeking damages does not sue for assault and battery.

---

[7] We disagree with the proposition advanced by Western Heritage that if Wroe had a valid self-defense claim, Krause necessarily committed an assault or battery. Based on the conflicting allegations in the complaint and in Wroe's written statement, it is possible Krause did not purposefully drive his truck at Wroe, but that Wroe nonetheless reasonably perceived an imminent threat to his life. A valid self-defense claim does not depend on the intent of Krause, but rather on whether Wroe reasonably perceived an imminent danger to his own life.

[8] It was possible a judgment based on a negligence cause of action could have been arrived at by a civil jury had the liability issues in the underlying action gone to trial. "[I]t is not a defense to negligence to contend that the conduct was willful or the harm intended." (*American Employer's Ins. Co. v. Smith*, *supra*, 105 Cal.App.3d at p. 101.) Similarly, it was not a foregone conclusion that Wroe would be either convicted of murder by intentionally killing Krause or nothing. This point is illustrated by Wroe's ultimate criminal conviction (based on a plea of nolo contendere) for involuntary manslaughter, a crime that can be based on negligent rather than willful behavior. (See Pen. Code, § 192 ["Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: . . . (b) Involuntary — in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection"].)

This case does not involve a straightforward attack as occurred in *Century Transit*, where nothing in the record indicated the taxi driver had a justification for his action or was forced to react to dangerous circumstances. Nor is this a case like *Zelda*, where the court observed it would be utter speculation to suggest an assault or battery did not occur — either the customer attacked the employee or the employee (unprovoked) attacked the customer.

The circumstances of this incident are subject to more conceivable interpretations than those presented in *Century Transit* and *Zelda*. Was Wroe purposefully creating a deadly confrontation when he pulled his gun and placed himself between Krause and the gate to the apartment complex? Was Wroe's conduct throughout the confrontation with Krause reasonable, or negligent, or reckless? Was Krause driving negligently, recklessly, or purposefully when his truck struck Wroe? Was Krause in fear of his life when he perceived a security guard threatening him with a gun? Which shot fired by Wroe killed Krause? Did Wroe intend any or all of the shots to hit Krause, or were they designed to stop the vehicle?

Despite these complexities, one thing remains clear: Wroe purposefully fired his gun four times at Krause's vehicle while Krause and his friend were inside. This is not a case in which any of the evidence hinted the discharge of the gun was not purposeful (i.e., Wroe doesn't know how the gun went off). This is not a case where a bouncer negligently deposited an unruly (but not assaultive) reveler on the curb. This is not a case where an independent act or omission (such as failing to call an ambulance promptly) arguably caused the death of Krause.

We need not definitively opine upon the precise contours of the assault or battery exclusion in the policy and how it should apply in every imaginable fact pattern. We only hold that the assault or battery provision must mean an intentional discharge of a gun in the direction of a human being, resulting in the immediate death of that individual by way of a bullet in the chest, cannot be covered under the policy. Unreasonable self-

defense in these particular circumstances is necessarily assault and/or battery. (See *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1165-1166; *McAfee v. Ricker* (1961) 195 Cal.App.2d 630, 635.) Reasonable self-defense would not result in coverage under the policy because a defense verdict would result. There is no potential for indemnification under the policy given the facts of this case. It is either an assault or battery, or there is no liability. Defendant can only be liable in damages under circumstances in which the assault and battery exclusion applies. Thus, there is no potential for coverage and Western Heritage had no duty to defend the lawsuit.

We reject the assertion that the policy is ambiguous for purposes of applying it to the facts of this case. The endorsement adding the assault or battery exclusion to the policy is conspicuous, plain, and clear under the circumstances of this case. The failure to define assault or battery may prove unclear in other circumstances, but here such terms must include a purposeful shooting. The endorsement is short (one substantive paragraph), with prefatory admonishments warning the insured "THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY." The exclusion is enforceable and applicable.

Public Policy

At least two cases have explicitly rejected the notion that state law requiring security firms to procure liability policies means it is against public policy to sell a liability policy with an assault and battery exclusion to a security firm. (*Hickey v. Centenary Oyster House* (La. 1998) 719 So.2d 421, 424-426; *Scottsdale Ins. Co. v. Texas Sec. Concepts* (5th Cir. 1999) 173 F.3d 941, 942-943.) We agree with the reasoning of these cases. The regulatory regime at issue is directed to private security firms, not insurers. It is a legislative, not judicial, function to decide whether to require security guard firms purchase liability policies with particular substantive provisions. The statutes

cited by plaintiffs (Bus. & Prof. Code, §§ 7583.39, 7583.40) do not bar the use of assault and battery exclusions in policies obtained for armed guards.

And though we agree security firms (and tort plaintiffs making claims against such firms) would be better served by an insurance policy without the assault and battery exclusion, the policy at issue is not wholly illusory. As noted by Western Heritage, the policy would cover accidental discharges of firearms or target practice mishaps. We can also imagine other accidental acts and omissions that do not even arguably involve assault or battery (e.g., a security guard misplacing a firearm such that it comes into the hands of a child).

DISPOSITION

The judgment is affirmed. Western Heritage shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.